No. 598

OCT 23 1
JAMES D. M

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918

BUTTE AND SUPERIOR COPPER COMPANY, LIMITED, a Corporation,

Appellant,

against

CLARK-MONTANA REALTY COMPANY, a Corporation, and ELM ORLU MINING COMPANY, a Corporation,

Appellees.

Notice and Motion to Dismiss Appeal for Want of Jurisdiction and Brief Supporting Motion.

JOHN P. GRAY,
JOHN L. TEMPLEMAN,
W. A. CLARK, JR.,
Counsel for Appellees.

Butte Miner Co., Printers

IN THE

Supreme Court of the United States

BUTTE AND SUPERIOR COPPER COMPANY, LIMITED, a Corporation,

Appellant,

vs.

CLARK-MONTANA REALTY COMPANY, a Corporation, and ELM ORLU MINING COMPANY, a Corporation,

Appellees.

OCTOBER TERM, 1918.

No......

MOTION TO DISMISS APPEAL FOR WANT OF JURISDICTION.

Now come Clark-Montana Realty Company, a Corporation, and Elm Orlu Mining Company, a Corporation, the appellees in the above-entitled cause, and move the Court to dismiss this appeal for the following reasons:

Because it appears from the Bill of Complaint filed in this cause on the 22nd day of July, 1914, in the District Court of the United States for the District of Montana, that no Federal question was or is presented by said bill, and, the requisite juris-

dictional amount appearing in said bill, that Federal jurisdiction over said cause depended entirely on diverse citizenship of the parties litigant,—the plaintiffs being citizens of the State of Washington and the defendant being a citizen of the State of Arizona, and the subject- matter of the cause involving merely the ownership of a patented lode mining claim situate in the District of Montana;

And because it further appears, the appellant herein having appealed from the final judgment and decree duly given and made by the said District Court of Montana in appellees' favor in this cause, on the 6th day of July, 1916, to the United States Circuit Court of Appeals for the Ninth Circuit, wherein the said judgment and decree of the said District Court of Montana was affirmed on the 18th day of February, 1918, and a rehearing thereon was denied April 1, 1918, that the said judgment and decree of the said Circuit Court of Appeals for the Ninth Circuit so affirming the said judgment and decree of the District Court of Montana became and was final under Section 128 of the Judicial Code.

JOHN P. GRAY,

JOHN L. TEMPLEMAN,

W. A. CLARK, JR.,

Counsel for Appellees.

To Messrs. Wm. H. Dickson, J. Bruce Kremer, Wm. Wallace Jr., Wm. Scallon and Rufus Thayer, Counsel for Appellant:

You will please take notice that on Monday, the 18th day of November, 1918, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the Court thereon.

Annexed is a copy of a Brief or Argument in support of said motion.

Dated this 16th day of October, 1918.

JOHN P. GRAY,

JOHN L. TEMPLEMAN,

W. A. CLARK, JR.,

Counsel for Appellees.

Service of the above and foregoing motion and accompanying brief is hereby acknowledged, and it is hereby consented that this motion may be submitted to the Court on the 18th day of November,

1918, or as soon thereafter as may be convenient for a decision thereupon.

Butte, Montana, October 16th, 1918.

W. H. DICKSON,

J. BRUCE KREMER,

WM. WALLACE, JR.,

WM. SCALLON,

K. R. BABBITT,

RUFUS THAYER,

Counsel for Appellant.

BUTTE AND SUPERIOR COPPER COMPANY, LIMITED, a Corporation,

Appellant,

vs.

CLARK-MONTANA REALTY COMPANY, a Corporation, and ELM ORLU MINING COMPANY, a Corporation,

Appellees.

OCTOBER TERM, 1918.

No......

BRIEF OR ARGUMENT IN SUPPORT OF MOTION TO DISMISS.

Appellant applied to this Court for a writ of certiorari to review the judgment and decree of the United States Circuit Court of Appeals for the Ninth Circuit now appealed from. The petition for such writ was denied by this Court July 10, 1918.

This action was brought by appellees against appellant in the District Court of the United States for the District of Montana to determine adverse claims to a patented lode mining claim situated in Montana.

The Montana statute under which the present action was brought is as follows:

Sec. 6870. "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

Rev. Codes of Montana of 1907.

Such an enlargement of equitable rights by state statute is recognized and administered by the Federal courts.

Lawson v. U. S. Min. Co., 207 U. S. 1.

Jurisdiction of the Federal court attached to the suit since coupled with the requisite jurisdictional amount it was averred in the bill that the plaintiffs are citizens of the State of Washington and the defendant a citizen of the State of Arizona, and that the suit was one which involved the ownership of a quartz mine situate in the district of Montana.

In Paragraph III. of the bill of complaint, it is to be observed that the jurisdiction of the Federal Court is invoked upon the ground, in addition to the diversity of citizenship, that the construction and application of Sections 2322, 2324, 2325 and 2332 of the Revised Statutes of the United States are involved. Such invocation of a Federal question by the bill amounts to a mere conclusion of the pleader and does not avail to give jurisdiction to the Federal Court. It is well settled that a formal statement of the bill to that effect is not enough to establish that the suit involves a Federal ques-

tion. But to the contrary it must appear by distinct averments, measured by the rules of good pleading, that the bill does actually present a Federal question.

> *Norton v. Whitside*, 239 U. S., at page 146;
> *Denver v. New York Trust Co.*, 229 U. S. at page 133.

As the jurisdiction of a Federal Court is to be determined solely from the construction of the substantial allegations of the bill, the test to be applied is simply this:

Disregarding the allegations of diverse citizenship, does the bill of complaint state a Federal question cognizable in the courts of the United States?

> *St. Anthony's Church v. Penn. R. Co.*, 237 U. S. at page 576.

The substance of the present bill paragraph by paragraph is:

1. The citizenship of plaintiffs.
2. The citizenship of defendant.
3. (a)

"III. That the jurisdiction of the United States District Court for the District of Montana over this suit is invoked and depends upon two grounds, to-wit:

1. Upon the ground that the construction and application of Sections 2322, 2324, 2325 and 2332, of the Revised Statutes of the United

State is involved, and the amount in controversy exceeds in value the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, all of which will appear from the facts hereinafter set forth."

3. (b)

The diversity of citizenship.

4. The discovery by plaintiffs' predecessors April 18, 1875, of a vein or lode of mineral-bearing rock on unoccupied public land within the limits of the Elm Orlu mining claim.

5. That the discoverers located the vein or lode, named it the Elm Orlu mining claim, posted a notice at the point of discovery containing the name of the claim, the names of the locators, the date of location, the number of lineal feet claimed along the vein and the width claimed from the center.

6. That the locators sunk a discovery shaft upon the lode.

7. That the locators immediately after posting notice marked the location on the ground, and thereafter within twenty days filed in the office of the county recorder of the county in which the claim is situated a declaratory statement in writing, a copy of which is attached and marked Exhibit "A."

8. That thereafter the locators and their successors in interest held, worked, possessed and actually occupied the said mining claim continuously

from the date of its discovery for more than five years.

9. Gives the number of the survey of the Elm Orlu and describes it by metes and bounds.

10. That about June 1, 1880, the owners of the Elm Orlu abandoned a portion of said claim, which is described by metes and bounds.

11. That in the year 1882 the owners of the Elm Orlu claim filed their application for patent, excepting therefrom that portion which had been theretofore abandoned, and in their application recited the facts with reference to the discovery, location and recording of the claim.

12. That thereafter the officers of the United States Land Office issued a receiver's final receipt and subsequently United States patent was issued therefor on the 31st day of January, 1884.

13. That subsequently, by mesne conveyances, the Clark-Montana Realty Company became the owner of said mining claim.

14. That about December 31, 1906, a lease was executed to the Elm Orlu Mining Company upon a royalty basis, which lease was thereafter extended and the Elm Orlu Mining Company has occupied and possessed said claim under and by virtue of the lease.

15. That the defendant is the owner of certain adjacent mining claims known as the Black Rock, Jersey Blue, Admiral Dewey and Silver, all of

which, together with the Elm Orlu, are shown upon an exhibit attached to the complaint, marked Exhibit C. The Black Rock is described by metes and bounds.

16. Tht subsequent to November 1, 1875, and prior to November 24, 1880, the predecessors in interest of the defendant located the Black Rock claim and filed in the office of the county recorder of the county in which the claim is situated a declaratory statement in writing, a copy of which is attached and marked Exhibit "B."

17. That thereafter and prior to November 24, 1880, the locators of the Black Rock mining claim filed in the United States Land Office an application for patent for said mining claim, based upon the said declaratory statement, and on November 24, 1880, a final receipt was issued therefor, and subsequently on February 15, 1882, patent of the United States was issued therefor.

18. The existence in the Elm Orlu mining claim of the apex of a vein called the Rainbow vein, its course and the lines which it crosses.

19. That the said Rainbow vein was the discovery vein of the Elm Orlu.

20. The downward course of the vein.

21. The ownership and possession of the said mining claim and of the said vein throughout its entire depth between planes drawn downward verti-

cally through the extended end lines of the Elm Orlu lode claim.

22. That the defendant asserts an adverse claim to plaintiffs in and to the said Elm Orlu mining claim and in and to the vein or lode referred to as the Rainbow lode, and that part of said lode which lies between vertical planes drawn downward through the end lines of said Elm Orlu lode extended northerly in their own direction, "the exact nature of which claim is unknown to the plaintiffs."

23. That any claim of the defendant is false, groundless and invalid.

24. The jurisdictional value.

25. A trespass by the defendant upon a part of the Rainbow vein by means of secret underground works in its exclusive control, and the extraction of ore therefrom, the exact amount of which ore plaintiffs have no means of ascertaining except by discovery.

26. A threat on the part of the defendant to continue such trespass.

27. The conveyance by W. A. Clark, Jr. to the Clark-Montana Realty Company of all causes of action which he had against said defendant for such trespass.

Prayer that defendant be required to set forth the nature of its claims; for a decree determining all adverse claims of defendant, adjudging defendant to have no interest or estate in the Elm

Orlu or in the Rainbow vein between the planes described, and restraining the defendant from entering upon the Elm Orlu lode claim or the Rainbow lode between the planes described; and the customary requests for accounting and equitable relief.

Hence an examination of the present bill shows that although plaintiffs asserted in Paragraph III. that they would invoke the jurisdiction of the Federal Court upon the ground of the presence of a Federal question, yet by the fact statement of the bill or otherwise no Federal question was made to appear. In truth, the very foundation for a Federal question was swept away by the averment of the bill that plaintiffs do not know the exact nature of the defendant's claim or claims.

Whether this Court has jurisdiction to entertain this appeal depends entirely upon the question whether in the statement of the plaintiffs' cause of action a Federal question was presented by the bill. If a Federal question was so presented by the bill, then this Court has jurisdiction; but if not, then the decree of the Circuit Court of Appeals for the Ninth Circuit was final by the express terms of Section 128 of the Judicial Code, as well after as before its slight amendment by Act of January 28, 1915 (38 Stats. 803). Any argument of the question is foreclosed by the many decisions of this Court.

Norton v. Whiteside, *supra*;

St. Anthony's Church v. Penn. R. Co., *supra*;

Merriam Co. v. Syndicate Pub. Co., 237 U. S. 618;

Hull v. Burr, 234 U. S. 712, 720;

Taylor v. Anderson, 234 U. S. 74;

Shulthis v. McDougal, 225 U. S. 561, 569.

Again, whether a cause is one arising under the Constitution or a law or treaty of the United States in the sense of the jurisdictional statute must be determined from what indispensably appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.

Taylor v. Anderson, *supra*;

Joy v. City of St. Louis, 201 U. S. 332.

The plaintiff is not required under the Montana Statute to set forth in his bill of complaint the nature of the defendant's claim or claims, but that duty devolves upon the defendant.

Woody v. Hinds, 30 Mont. 191;

Devine v. City of Los Angeles, 202 U. S. 313, 333.

To make out a complete cause of action under the Montana Statute, the plaintiff need only aver

that he is the owner of and in the possession of the real property described and that the defendant claims some adverse rights thereto, with prayer that the defendant be required to set forth the nature of his claims that the same may be determined by the court.

Merk v. Bowery Min. Co., 31 Mont. 298;

Pollock Min. & M. Co. v. Davenport, 31 Mont. 452.

It is, therefore, very patent to us now that the present bill contains many superfluous and unnecessary allegations, but it must be added that had the bill not sought the incidental relief of compensation for past trespasses, it would follow generally and particularly in Montana that plaintiffs never would be allowed to recover therefor in any subsequent suit.

Maloney v. King, 30 Mont. 414;

M. O. P. Co. v. B. & M. Co., 27 Mont. 288.

It may, however, be safely said that the present bill of complaint does not pretend to disclose the nature of any controversy between the plaintiffs and defendant concerning the subject matter in suit, and further intimates that it could not if it would, because it is averred the exact nature of the defendant's claims is unknown. Hence the indispensable element of a Federal question, namely, a

well averred, substantial dispute or controversy respecting the validity, construction or effect of some law of the United States is necessarily absent from the present bill.

The rules of the Federal question applicable to and controlling this appeal are those expressed by this Court in *Shulthis v. McDougal*, 225 U. S. at page 569:

> "1. Whether the jurisdiction depended on diverse citizenship alone, or on other grounds as well, must be determined from the complainant's statement of his own cause of action as set forth in the bill, regardless of questions that may have been brought into the suit by the answers or in the course of the subsequent proceedings. *Colorado Central Mining Co. v. Turck*, 150 U. S. 138; *Tennessee v. Union and Planters' Bank*, 152 U. S. 454; *Spencer v. Duplan Silk Co.*, 191 U. S. 526; *Devine v. Los Angeles*, 202 U. S. 313, 333.
>
> 2. It is not enough that grounds of jurisdiction other than diverse citizenship may be inferred argumentatively from the statements in the bill, for jurisdiction cannot rest on any ground that is not affirmatively and distinctly set forth. *Hanford v. Davies*, 163 U. S. 273, 279; *Mountain View Mining Co. v. McFadden*, 180 U. S. 533; *Bankers' Casualty Co. v. Minneapolis &c. Co.*, 192 U. S. 371, 383, 385.
>
> 3. A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon

the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws. *Little York Gold-Washing and Water Co. v. Keyes*, 96 U. S. 199; *Colorado Central Mining Co. v. Turck, supra; Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571; *Florida Central & P. Railroad Co. v. Bell*, 176 U. S. 321; *Shoshone Mining Co. v. Rutter*, 177 U. S. 505; *De Lamar's Nevada Co. v. Nesbitt*, Id. 523."

II.

If, upon consideration of this motion to dismiss, it were permissible to review the answer to the present bill, it would be observed therefrom at once that the defendant stoutly denied that jurisdiction attached to this suit by reason of the existence of any Federal question appearing in the bill, and that defendant's claims to the Elm Orlu were founded (a) upon a certain deed by one of the plaintiffs to defendant's predecessor; (b) upon an alleged priority of mining right in the defendant's Black Rock lode over the Elm Orlu lode; (c) upon a denial of the existence of the Rainbow vein in the Elm Orlu claim; and (d) upon the assertion that a vein apexing in the Black Rock was the vein the plaintiffs were mistaking for the Rainbow vein. Hence the answer would disclose very largely issues

of fact, involving some questions of law to be sure, but never involving a Federal question.

Upon the issue of priority, the answer does not disclose how any priority of mining right would be a material inquiry. But if priority of mining right between the Elm Orlu and Black Rock lodes were any material issue, then upon the issue of priority as made to appear by the bill and the answer, such priority should be awarded to the Elm Orlu as the earlier location in order that any decision on priority might conform to the following well-settled precedents of this Court:

State or territorial legislation does not and may not control the ultimate disposal of the public lands.

Wilcox v. McConnel, 13 Pet., page 516;

Irvine v. Marshall, 61 U. S. 558;

Gibson v. Chouteau, 80 U. S. 92;

McCune v. Essig, 199 U. S. 382;

Utah Power & Light Co. v. United States, 243 U. S. 389.

A United States mineral patent conclusively adjudicates a compliance with state or territorial statutes relating to the location and record of mining claims made upon the unoccupied public domain within the state or territory.

Creede Min. Co. v. Unita Tunnel Co., 196 U. S. 337, 348.

See, also:

Lawson v. United States Mining Co., 207 U. S. 1;

El Paso Brick Co. v. McKnight, 233 U. S. 250.

Furthermore, the effect to be given state or territorial statutes regulating the location and record of mining claims made upon the unoccupied public domain within the state or territory, does not give rise to a Federal question, because such statutes, although recognized by Congress, are not by virtue of any such recognition, thereby incorporated into the body of the Federal law.

Shoshone Min. Co. v. Rutter, 177 U. S. 505, 508.

Upon the ground that jurisdiction over this suit in the District Court of Montana depended entirely on diverse citizenship, upon the authority of *Shulthis v. McDougal* and *Norton v. Whiteside, supra*, and upon the express provisions of Section 128 of the Judicial Code, it is submitted that this appeal must be dismissed for the want of jurisdiction in this Court to entertain it.

JOHN P. GRAY,
JOHN L. TEMPLEMAN,
W. A. CLARK, JR.,
Counsel for Appellees.